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AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES, APPELLANT
v.
ELMO R. ROYER
No. 359

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

This is an appeal from a judgment of the Court of Claims awarding the plaintiff-appellee $240.19 upon findings of fact made after trial of the issues.

That sum represents the difference between the rate of pay of a Captain of the United States Army serving in France and that of a Major, for the period from October 18, 1918, to February 17, 1919, which the claimant drew as pay for the rank of a Major for the period stated while serving as a medical officer with the American Expeditionary Forces in France during the late war.

At the time claimant was discharged from the Army in August, 1919, in determining the final settlement to be made with him, the Disbursing Officer

deducted the $240.19, for the reason that it was an overpayment in salary due to an error in a cablegram sent by The Adjutant General on September 23, 1918, to General Pershing, stating that claimant had been promoted from a First Lieutenant to a Major, Medical Corps, U. S. A., when, as a matter of fact, he had been appointed a *Captain.*

THE FACTS

The following facts have been determined by the Court of Claims:

On August 5, 1918, while the claimant was serving in France as a First Lieutenant, Medical Reserve Corps, on active duty, General Pershing sent a cablegram to the Chief of Staff, recommending the promotion of the claimant (and seventeen others, all First Lieutenants) to be Majors, Medical Reserve Corps. The recommendation was referred to the Surgeon General of the Army, who, on August 22, 1918, returned it to The Adjutant General, recommending approval of the promotion of the claimant (and sixteen others) from First Lieutenant to Captain, stating therein that a vacancy existed for these appointments in the Medical Department. This recommendation of the Surgeon General was approved by order of the Secretary of War indorsed thereon. (Second Finding of Fact; Rec. 3–4.)

On September 23, 1918, The Adjutant General cabled General Pershing to the effect that the claimant, a First Lieutenant, had been appointed

a Major, Medical Corps (together with seventeen others therein named).

On September 28, 1918, the Surgeon General's office in France notified the claimant to the effect that he had been commissioned Major, Medical Corps, U. S. A., referring to the cablegram from the War Department dated September 23, 1918, and requesting him to submit his letter of acceptance and oath of office without delay.

The claimant submitted a letter of acceptance and executed the oath of office on October 18, 1918, assuming the insignia of the rank of Major, performing the duties appropriate to that office, and being officially addressed as such. (Third Finding; Rec. 4.)

On November 21, 1918, The Adjutant General cabled the Commanding General in France as follows:

> Referring to your subparagraph E, paragraph 1, cablegram No. 1559, recommending certain Medical Reserve Corps officers for promotion, and to paragraph 9, cablegram 1973, from this office, advising that the following-named first lieutenants had been appointed majors in the Medical Corps—
>
> "* * * Elmo R. Royer * * * (and 17 others)."
>
> you are advised that the cablegram from this office was in error in advising you of the appointment of these officers as majors.

> The records of this office show that these officers were recommended by the Surgeon General for appointment as captains and his recommendation approved by the Chief of Staff, and the above-mentioned officers were so appointed.

The first indorsement on this communication of November 21, 1918, was to the effect that by command of General Pershing each of the officers named would resume his proper rank and make proper adjustment of pay overdrawn.

The second indorsement thereon recommended that, inasmuch as the claimant (and the other officers concerned) had accepted the promotion to Major and had drawn the pay as such, all in good faith, they be allowed to retain the pay drawn as Major up to the time of the acceptance of the commission as Captain. (Fourth Finding; Rec. 4.)

The third indorsement stated (1) that, although the promotion to the grade of Major and pay therefor had been drawn in good faith by the claimant, there was no legal way in which claimant could be paid as Major because of error in the cable. "In other words, an acceptance of a commission as Major when such commission was not issued would not constitute a valid claim for pay as Major." (2) Accordingly, request was made for the latest address for each of the officers concerned in order that appropriate action may be taken toward having the pay refunded on account of overpayment. "By authority of the chief quartermaster."

At the time the order of November 21, 1918, was made, as just described, claimant was not in France, having sailed therefrom on November 15, 1918, for the United States with other casuals. From October 18, 1918, until November 15, 1918, he was in several base hospitals, named at page 5 of the record. Upon his return to the United States and while still in a hospital he received his first notice of the above-described error.

Under date of February 19, 1919, claimant was notified by the Chief Surgeon, A. E. F., France, that he had been commissioned Major, Medical Corps, U. S. A., per S. O. 48, par. 88, G. H. Q., A. E. F., dated February 17, 1919, and requesting him to submit his letter of acceptance and oath of office to the Surgeon General without delay.

This latter appointment is shown by the record to be a promotion from the rank of Captain to that of Major, from February 17, 1919. (Fourth Finding; Rec. 5.)

On January 7, 1919, the Chief Quartermaster addressed a communication to claimant in Base Hospital 44, stating that a copy of the letter dated November 21, 1918, (already referred to in the Fourth Finding) with first indorsement of G. H. Q., A. E. F., dated December 17, 1918, were attached thereto, and in pursuance thereof requested a refund, either in cash or by deduction on pay voucher, of the difference between the pay of Major from date of acceptance of commission and that of Captain up to and including the date last paid as Major.

The claimant replied on February 21, 1919, stating that he had been ordered to the United States, had sailed November 15, 1918, and had taken the matter up with The Adjutant General's office. Washington, for adjustment. His statement was to the effect that he had been appointed Major with rank from September 23, 1918, as per cable from The Adjutant General. The Court then found: "The Adjutant General stated on March 3, 1919, that the records of his office showed that Major Elmo R. Royer, Medical Corps, was appointed as such September 23, 1918, per cable to Gen. Pershing."

The matter in due course reached The Adjutant Generals office, which reached the conclusion:

> 3. This office adheres to its former views, that where, as in this case, the records disclose that Lieut. Royer was actually appointed captain and erroneously notified that he was appointed major, he would not be entitled to the rank and pay of major. Having erroneously drawn the pay of major since October 18, 1918, he should be required to refund the difference. (Fifth Finding; Rec. 5–6.)

The claimant was paid as Major from October 18, 1918, until the date of his reappointment in February, 1919. From the date of his reappointbent in 1919 he was paid as Major. At the date of his discharge, August 31, 1919, there was paid to him on account of his pay and allowances as Major the sum of $240.10 less than was due him.

On August 23, 1919, the claimant having applied for discharge, he was informed that he would not be permitted to take advantage of a leave of absence for that purpose until he had made proper settlement of the claim of the Government; that he had been paid as Major prior to February, 1919, instead of being paid as Captain for that period, and that he should restore the difference in pay between those ranks, which amounted to $240.19. Accordingly, this sum was deducted and has never been restored or paid to him. (Sixth Finding; Rec. 6.)

Upon the foregoing findings the Court of Claims (Downey, J., dissenting, Rec. 9–11) determined that claimant was not entitled to maintain a suit to recover the pay of a Major for a period during which he did not legally hold such office, but that, nevertheless, having been so paid through error, he was entitled to retain the pay, and judgment in his favor was rendered for $240.19, the difference between the rate of pay of a Captain and that of a Major, Medical Reserve Corps, for the period October 18, 1918, until February 17, 1919. (Rec. 6–9.)

THE ISSUE

The specific question involved is whether a person who has been legally appointed and commissioned a *Captain* in the Medical Corps and who has received in good faith the pay allowed by law for the rank of a Major can retain the same—

(a) When the money is paid under mistake of fact caused by an *error* made by The Adjutant

General, who has no power to appoint officers in the United States Army;

(b) When the money has been paid by a disbursing officer in good faith through oversight or negligence of some other agent of the Government; and

(c) When no such appointment as Major was ever intended, expressly or impliedly, to be made by those having authority to make such an appointment.

CONTENTIONS OF THE UNITED STATES

The Government contends: *First,* That claimant was an officer *de jure* with the rank of *Captain* Medical Corps, U. S. A., for the period October 18, 1918, to Februay 17, 1919, and therefore could not be at the same time an officer *de facto* with the rank of Major. *Secondly,* That under the facts found by the Court of Claims the overpayment was made under a clear mistake of fact through an *error* committed through oversight or negligence, and therefore is recoverable.

ARGUMENT

I

The Court of Claims has not determined as matter of fact or law that the claimant had the status of a de facto officer with the rank of Major for the period October 18, 1918, to February 17, 1919, and such a status is essential in order to preclude the Government from recovering the overpayment in salary

In the majority opinion (by Judge Hay, Rec. 6–9), the Court of Claims has taken the position that while claimant can not maintain a suit to re-

cover the pay of a Major for the period involved because he did not legally hold that office during that time (Rec. 7–8), he can not be compelled to refund the sum overpaid through error, for the reason that he had acted in good faith in the belief that he was in fact and law a Major; had executed his oath of office as a Major; had assumed its responsibilities, and had rendered service to the Government as such officer. In support of this theory the court relies upon these cases: *Miller* v. *United States*, 19 C. Cls. 338, 354; *Montgomery* v. *United States*, Id. 370, 376; *Bennett* v. *United States, Id.* 379, 388; *Palen* v. *United States, Id.* 389, 394, and *Badeau* v. *United States*, 130 U. S. 439, 452.

All of the authorities cited lay down the rule that when an *officer with power to appoint* has, through a *misconstruction of the law, appointed* a person to an office, any monies paid by agents of the Government in the belief that the appointee was an officer *de jure* can not be recovered if it should later develop that he is only a *de facto* officer, and as such has rendered services in good faith.

That rule, as pointed out in the well-reasoned dissenting opinion of Judge Downey (Rec. 9–11), has no application to the case at bar.

The reason is obvious. There is no finding of fact that the claimant was a *de facto* officer with the rank of Major for the period in question. Nor does the majority opinion so hold. It is true that quotations from other cases have been made therein

which announce the doctrine that a *de facto* officer can not be required to return money paid while in discharge of the duties of his office. But this alone is not a determination that the claimant was, as a matter of law, a *de facto* officer.

This is the view taken by Judge Downey. In this connection he says (Rec. 9):

> The plaintiff, it is rightly said, was not a Major during the period from October 18, 1918, to February 17, 1919. It is not held in the majority opinion and, in my judgment, could not be held, if of any importance, that he was a Major *de facto*. He was a Captain and became a Major by subsequent promotion to rank as such from February 17, 1919.

It is apparent, therefore, as we interpret the decision, that it announces the law to be that when money has been paid by disbursing officers of the Government, without legal authority, under a clear mistake of fact, caused by an error of some other officer *without appointive authority,* for services rendered without legal authorization, and under the same mistakes of fact, it can not be recovered, even in the absence of a *de facto* status, providing the person to whom it was paid has acted in good faith, in the belief that he was lawfully employed.

No court, as far as we have been able to determine, has ever laid down such a doctrine, which, it is plain, is so broad in its scope, so adverse and detrimental to the interests of the public, that it is nothing short of radical. It conflicts with the

settled rules which the courts have laid down for the protection of the Federal Government in the administration of its affairs. It breaks down the barrier which the courts have carefully built up around the sovereign to prevent losses, by estopping the Government from defending upon the ground that the money was paid out by a mistake of fact, and without authorization in law. Their mistakes have many times forced the Government to the courts for protection. The judiciary has zealously endeavored to prevent the loss of money on the part of the Government through errors committed by one of its servants.

We think the practical effect of the decision under consideration is to dissolve the line which this Court has carefully drawn between a mistake made by an *appointive* officer through a misconstruction of the law, as in the *Badeau case,* wherein it was held that under such circumstances the appointee was a *de facto* officer, and the ordinary mistakes of law and fact, made by agents or employees of the Government, whose acts have no contractual force, or are contrary to some controlling provision of law, as in *United States* v. *Burchard* 125, U. S. 176, or *Wisconsin Central Railroad Co.* v. *United States,* 164 U. S. 190. In the former case the United States was not permitted to recover. In the latter cases the United States can recover, and the question of good faith or services rendered is not involved. No person can justify the unlawful receipt of money for services performed

by pleading good faith. Something more than that is necessary, namely, that the services were authorized by an agent of the Government, invested with *appointive* or *contractual* power to bind the principal. Except in such cases it makes no difference whether the money is paid out on account of a mistake of law or a mistake of fact. The principal involved remains the same. The money can always be recovered, or be deducted in any settlement made by a disbursing officer. *Gratiot* v. *United States,* 15 Pet. 336; *Hunter* v. *United States,* 5 Pet. 172, 186; *United States* v. *Burchard,* 125 U. S. 176; *Wisconsin Cent. R. R. Co.* v. *United States,* 164 U. S. 190; *Grand Trunk Ry. Co.* v. *United States,* 252 U. S. 112, 121; *McElrath* v. *United States,* 102 U. S. 426; *United States* v. *Stahl,* 151 U. S. 366; *Sutton* v. *United States,* 256 U. S. 575, 580; *Spencer* v. *United States,* 10 C. Cls. 255; *Benjamin* v. *United States,* 10 C. Cls. 474; *Bonnafon* v. *United States,* 14 C. Cls. 484; *Taggart* v. *United States,* 17 C. Cls. 322; *Weeks* v. *United States,* 21 C. Cls. 124; *Howes* v. *United States,* 24 C. Cls. 170; *Baxter* v. *United States,* 32 C. Cls. 75; *Royal Italian Government* v. *The National B. & C. Tube Co.,* 294 Fed. 23, 27.

When the United States entered the war in 1917, the President alone was authorized to appoint officers in the Reserve Corps for active service. The National Defense Act, August 28, 1916, c. 134, Sections 37 and 38, 39 Stat. 165, 189. The Medical Corps was included, *Id.,* Section 37, 39 Stat. 190.

The Act of May 18, 1917, c. 15, 40 Stat. 76, authorized the President to increase temporarily, in view of the emergency, the military establishment of the United States, and in the third paragraph (40 Stat. 77) provided "that officers with rank not above that of Colonel shall be appointed by the President alone." General Orders, War Dept. No. 132, dated October 10, 1917; No. 78, W. D., dated August 22, 1918, and No. 162, G. H. Q., A. E. F., dated France, September 24, 1918, in force at the time the matter in dispute arose, prescribed the rules which would govern the recommendation of officers of the A. E. F. for promotion up to the grade of Colonel, or the promotion itself, where the same was within the authority of the Commander in Chief.

In effect these rules provide with regard to promotions that, if there did not exist a vacancy in France, the Commander in Chief was not authorized to make a promotion by temporary appointment, and in such a case the recommendation would have to go forward through the usual channels to the War Department for appropriate action. This is exactly what was done in the case at bar.

On August 5, 1918, claimant was a First Lieutenant in the Medical Reserve Corps serving on active duty in France. On that date General Pershing sent a cablegram to the Chief of Staff, recommending the promotion of claimant (and others of the same rank) to Major, Medical Re-

serve Corps, to rectify inequalities in grade due to mistakes in original appointments. (Second finding, Rec. 3.)

It is reasonable to assume that this cablegram was sent pursuant to the General Orders referred to, no vacancies existing in France which would have authorized General Pershing to make the promotions himself by temporary appointments.

The cablegram was referred to the Surgeon General, who, on August 22, 1918, returned the same to The Adjutant General, recommending claimant (and others) for promotion to the rank of *Captain*, and not *Major*, as recommended by General Pershing. (Rec. 3.) In the first indorsement thereon it is stated by the Surgeon General,

> 6. A vacancy exists for these appointments in the Medical Department.

This recommendation of the Surgeon General was approved by the Secretary of War. (Rec. 4.) Accordingly, claimant was promoted by appointment to the rank of *Captain*, Medical Reserve Corps.

The Adjutant General, in his cablegram dated September 23, 1918, notifying General Pershing of the appointment of claimant, stated through error, that claimant had been appointed a Major. (Third Finding, Rec. 4.) This was an error made by The Adjutant General or one of his subordinates, because as a matter of fact claimant had been appointed a *Captain* and not a Major. In ignorance of this error, relying upon the truth of the state-

ments of the cablegram, and following the usual procedure, the Surgeon General's office in France, on September 28, 1918, notified claimant that he had been appointed a Major; requested him to submit his letter of acceptance and to execute his oath of office without delay. Claimant, without knowledge of the error, and in conformity with the request, forwarded his letter of acceptance and executed the oath of office on October 18, 1918.

On November 21, 1918, The Adjutant General by cablegram advised General Pershing of the error. The first indorsement thereon stated that by command of General Pershing the claimant (together with all the other officers affected by the error) would assume the proper rank (that of Captain) *and make proper adjustment of pay overdrawn.* The second indorsement (by whom made is not disclosed by the record) recommended that claimant be permitted to retain the pay because he had acted in good faith in the matter. The third indorsement, by authority of the Chief Quartermaster, apparently in answer to the second indorsement, stated that the overpayment could not be legally retained by claimant (and the other officers), assigning therefor the following reason:

> In other words, an acceptance of a commission as Major when such commission was not issued would not constitute a valid claim for pay as Major. (Rec. 5.)

Accordingly, it was requested that the Quartermaster be furnished with the latest address of each of the officers concerned, in order that appropriate action might be taken to obtain a refund on account of the overpayment.

The claimant received notification of the error after he had returned to the United States, but the record does not disclose the exact date thereof. (Fourth finding, Rec. 4–5.) The amount overpaid was deducted from claimant's pay in the final settlement of his account on the date of his discharge from the Army.

We think it plain that under the facts found by the Court of Claims the claimant never became a *de facto* officer with the rank of Major for the period October 18, 1918, to February 17, 1919.

The claimant has not shown that the office existed to which he alleges he was appointed. A person can not become a *de facto* officer unless there be a *de jure* office to fill, *Norton* v. *Shelby County,* 118 U. S. 425; *Romero* v. *United States,* 24 C. Cls. 331. In other words, there can not be a *de facto* officer in a *de facto* office. *In re Norton,* 64 Kan. 842; *Rasmussen* v. *Laramie County,* 8 Wyo. 277.

The decided cases, both of the Federal and State courts, dealing with the subject of what constitutes a *de facto* officer, usually involve either the question of whether there was a legal office to hold, or whether the appointee held title to the office. The cases dealing with the proposition of whether a

person is a *de facto* officer all seem to involve the question of whether he could qualify or whether the *appointing officer* had authority to make the appointment. That is not the situation in this case.

Here the record plainly shows that there was no attempt, expressly or impliedly, on the part of any officer having authority to appoint the claimant to the rank of Major, to exercise that power. The procedure followed by the officers in France in reliance upon the cablegram notifying them that the claimant had been appointed a Major was *pro forma*. It is clear that General Pershing did not attempt to appoint the claimant to such an office in the absence of a vacancy, and the record does not show that a vacancy existed in France. He certainly did not intend so to appoint claimant a major, because he expressly commanded that claimant (and the other officers involved) assume his (or their) proper rank, (that of a captain), and make a refund of the overpayment. (Rec. 4.)

The Adjutant General had no authority to appoint officers in the Army, therefore we can not say that the error committed by him made the claimant a *de facto* officer, for the reason that his act was not the act of the Secretary of War. He merely performed the *Secretarial* duty of informing General Pershing of the action taken upon his recommendation, but in so doing made a mistake.

The claimant has, therefore, failed to show two important elements necessary to make him a *de facto* officer: *First*, That there was a *de jure* office;

and *secondly*, That some one with authority to appoint him to an office, either expressly or impliedly exercised or attempted to exercise that authority. The absence of these two important factors militates against any idea that the claimant was a *de facto* officer with the rank of Major. Therefore, the facts in the case at bar are quite different from those involved in *Badeau* v. *United States*, 130 U. S. 439, 452, and the other cases cited in the majority opinion.

An exhaustive examination of the judicial authorities has failed to disclose a case in any way similar on the facts to the case at bar.

There is, however, one case decided by the Court of Claims somewhat analogous to the instant case. In *Truitt* v. *United States*, 38 C. Cls. 398, it appeared that Truitt was a Captain in the Regular Army and sought to recover the pay of a Major while on staff duty as Assistant Adjutant during the war with Spain, less the pay received by him as Captain. The Secretary of War assigned him to staff duty. It did not appear, however, that the President had appointed Truitt to such office, or that he directed the issuance of the order. Truitt, however, was paid at the rate of a Major, but was compelled to refund and did refund the amount so paid in excess of that allowed a Captain. The court determined that the action of the Secretary of War was not the action of the President, and therefore Truitt was not entitled to the rate of pay of a Major. It then went on to say that the fact

that Truitt had performed the services did not entitle him to recover, for the reason that it was essential to show that the President appointed him or assigned him to the duty which he performed, and inasmuch as he had failed to do this, there could be no recovery. The similarity of the Truitt case and the one at bar is this: In the Truitt case, the Secretary of War issued an order which he had no authority to do so far as making the Government liable for compensation to the officer who performed the duty. In the latter case there was no authority in The Adjutant General to appoint the claimant as an officer in the Army. If, because of the lack of authority in the Truitt case, the claimant could not recover, the claimant in the present case certainly can not recover, for the additional reason that there was no attempt to make an appointment, for it was a plain error committed by an officer of the Government, not involving the exercise of judgment or discretion, that was responsible for the overpayment.

In addition to the *Truitt* case, however, there is one somewhat similar to the case at bar which arose in the office of the Comptroller of the Treasury and may be found in Volume 17, Compt. Dec., at page 219. In brief, the facts were these: One *Allen* Parker, of Fairmont, Indiana, was designated by the President for examination for appointment as Second Lieutenant. He was examined and qualified. His commission was made out on April 22, 1899, in the

name of *Allen* Parker, but was sent to the address of *Austin Allen* Parker, Stevens Building, Indianapolis, Indiana, under the mistaken impression that these two Parkers were one and the same man, and the address of *Allen* Parker not being known at that time. Two days later *Allen* Parker informed The Adjutant General that his address was Fairmont, Indiana, but upon the assumption that his commission had been forwarded to him, no notice was taken of his letter. Nothing was heard from the commission until May 31 following, when the acceptance and oath of office of *Austin Allen* Parker were received. The commission was returned to the The Adjutant General's office June 15 for the correction of name, which was done, the name being changed to *Austin Allen* Parker. It was not until June 25, 1899, that it was discovered that Lieutenant *Allen* Parker and *Austin Allen* Parker were separate and distinct men. It did not appear that *Austin Allen* Parker had ever been designated for appointment as subject to final examination, but he accepted the commission intended for *Allen* Parker and forwarded his oath of office and letter accepting the commission. On July 5, 1899, the War Department notified *Austin Allen* Parker of the status of the case. Later, the President by special order permitted *Austin Allen* Parker to take an examination for appointment, which he did, and a new commission was issued on July 22, 1899. The Comptroller held that *Austin Allen* Parker was never a *de jure* or a *de facto* Second Lieutenant

in the United States Army, except under the new appointment. In this connection, the Comptroller at page 223, says:

> Upon the facts stated, I do not think the appellant acquired any rights under the commission in question, which was issued to Allen Parker, and not to him, and upon the facts stated I do not think he is entitled to recover any more than if said commission had never been issued; and, this being true, no order was ever issued to him to perform travel or to perform any other military service because of said commission.

Accordingly, the claim for the amount which Austin Allen Parker had refunded to the Government was disallowed.

There is no substantial difference between that case and the one at bar. In both instances the money was paid under a mistake of fact, due to an *error,* and in both cases no officer with appointive authority attempted or intended to make the appointment.

The fact that claimant took the oath of office and performed services as a major does not alone entitle him to retain any money paid under the mistake of fact. 23 Comp. Dec. 65.

It is clear that there can be no *de facto* status as an officer of the Army when such claim is based upon a plain error committed by an agent of the Government without appointive authority. See particularly 25 Comp. Dec. 925, holding that there

could not be a *de facto* officer of the Medical Reserve Corps, U. S. Army.

It follows, therefore, the instant case is clearly distinguishable from the *Badeau* and the other cases cited by the Court of Claims in the majority opinion, because the claimant never became a *de facto* officer with the rank of major during the period under consideration.

II

Under the findings of fact made by the Court of Claims the case falls within the general rule of law, so often applied by this Court, that money paid by disbursing agents under a mistake of fact can be recovered

The case at bar is controlled by the well-settled rule laid down by this court that money paid under a mistake of fact by disbursing officers of the Government can be recovered either by a direct action, *United States* v. *Barlow,* 132 U. S. 271, 281, *United States* v. *Sanborn,* 135 U. S. 271, *United States* v. *Kerr,* 196 Fed. 503, or by way of set-off, *McElrath* v. *United States,* 102 U. S. 426, *United States* v. *Burchard,* 125 U. S. 176, *United States* v. *Carr,* 132 U. S. 644, on the theory that the Government is not liable for an error committed by an agent through mistake or negligence when in so doing the officer is not exercising a judgment or discretion reposed in him by law.

In passing upon these matters the courts do not deal with the Government in the same way that they would deal with an individual. They will not

act so as to defeat the purposes of Congress, reflected in statutes, upon considerations which are applicable to agreements made between individuals. *United States* v. *Hume,* 132 U. S. 406. The general idea seems to be in such cases to protect the Government so far as it is possible from the thoughtless acts of its officers and agents. So it has been held that the Government can not be deprived of any of its rights because of the acts of its officers or agents, whether these be acts of omission or commission, if such acts are contrary to the provisions of any statute. *Pine River Logging Co.* v. *United States,* 186 U. S. 279, 291; *United States* v. *Cosgrove,* 26 Fed. 908. Nor is it estopped from asserting its rights because of the unauthorized acts of its agents and officers. *German Bank of Memphis* v. *United States,* 148 U. S. 573. Nor is it liable for acts of misfeasance, nonfeasance or negligence of its officers or agents. *German Bank of Memphis* v. *United States,* supra. The principle upon which these rules rest is well stated by Bevan, " Negligence in Law," Volume 1, page 220:

> No government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of powers by its officers and agents; and the executive does not guarantee to any persons the fidelity of any of the officers or agents whom it employs, since this would involve it, in all its operations, in embarrassments and difficulties and losses which would be subversive of the public interests.

It is definitely established that the United States is not bound by any mistakes of fact made by its officers or agents. *McElrath* v. *United States*, supra; *United States* v. *Burchard*, supra; *United States* v. *Kerr*, 196 Fed. 503; *United States* v. *U. S. Fidelity & Guaranty Co.*, 151 Fed. 534. And where money has been paid out by governmental officers through mistake of fact, the Government can recover such money so paid out. Excess payments made by the United States through mistakes of its agents may be recovered. *United States* v. *Stahl*, 151 U. S. 366; *Wis. Central R. R. Co.* v. *United States*, 164 U. S. 190. These principles are just, because the voluntariness of the payment is a voluntariness on the part of the officer or agent, and there is no reason why the Government should be bound by the voluntary acts of its officers or agents any more than it should be bound by the negligence or willful misconduct of its officers or agents. It is difficult to conceive of a more destructive rule, having regard to the interests of the public, than one which would preclude the Government from recovering money paid under a mistake of fact through an error committed by an officer through oversight or negligence, as in the present case.

It is a matter of common knowledge that disbursing officers of the Government during the war in France had to rely for authority to make payments to officers upon cablegrams or orders from the

officers in command in France. There was no time to await the receipt of the commission or a confirmation or verification of the appointment, and so, under such circumstances, it is little short of preposterous to say that the Government can not recover such monies. It is not inequitable or unjust in a case of this kind to say that the officer must take the chance that the money he receives is properly authorized, otherwise he must refund it to the Government. If the rule were otherwise, the Government would be held responsible for every mistake or error committed by any of its officers, whether it be a mistake of judgment, or discretion, or a mere clerical error.

CONCLUSION

If claimant has been injured as a result of the error, his redress is either against the officer who committed the error or by application to Congress. *United States* v. *Buchanan,* 8 How. 82, 105; *German Bank* v. *United States,* 148 U. S. 573.

It is submitted that the decision of the Court of Claims is unsound in principle and law and should be reversed.

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MARCH, 1925.

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